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Supreme Court of the United States

October Term 1957

No. 419

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

DERLYN E. MOE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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EASTERN AIR LINES, INC.,

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DERLYN E. MOE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Eastern Air Lines, Inc. (hereinafter referred to as "Eastern"), respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit to the end that this Court may review the judgment which the said Court of Appeals has rendered in the above-entitled case.

Opinions of the Courts Below

The opinion of the Court of Appeals has not yet been officially reported. It appears as Appendix "A" to this petition, and it is unofficially reported in 32 Labor Cases 70,789.

The opinion of the United States District Court for the Southern District of Florida, which was reversed by the Court of Appeals, has not been reported. It appears in the printed transcript of record (hereinafter cited as "R. ....") at pages 53-58. It is also reproduced as Appendix "B" hereinafter.

Grounds on Which This Court's Jurisdiction Is Invoked

This Court's jurisdiction is invoked for the following reasons:

(1) The decision of the Court of Appeals in this case conflicts with the decisions of other courts of appeals in holding:

(a) That a probationary employee is not a "temporary" employee within the meaning of the Universal Military Training and Service Act, 62 Stat. 614 as amended by 65 Stat. 75; 50 U. S. C. 459 (hereinafter referred to as "the Act"); and

(b) That the Act requires the granting of wage increases based on time spent in military service even though the applicable collective bargaining agreement provides that only actual on-the-job experience shall be counted in determining the employee's position on the "wage ladder."

(2) The Court of Appeals has decided important questions of Federal law which have not been, but should be, settled by this Court.

(3) The Court of Appeals has decided the question of exclusive primary jurisdiction (as between the District Court and the Appropriate Adjustment Board) in a way deemed to be in conflict with applicable decisions of this Court in *Slocum* v. *Delaware L. & W. R.R.*, 339 U. S. 239 (1950), and other cases.

The judgment of the Court of Appeals sought to be reviewed herein was rendered and entered on June 18, 1957. Copy of said judgment is reproduced as Appendix "C" hereto.

Jurisdiction in this Court to review the judgment of the Court of Appeals, through the issuance of a writ of certiorari, is established by the provisions of 62 Stat. 928; 28 U. S. C. 1254.

As hereinafter noted, under the caption "Statement of the Case," Eastern believes that exclusive primary jurisdiction of the controversy here involved is vested in the Eastern Air Lines Pilots System Board of Adjustment, and that therefore Federal jurisdiction was lacking in the court of first instance—*i.e.*, the District Court.

Questions Presented for Review

I.

Where a collective bargaining agreement under the Railway Labor Act (44 Stat. 577, as amended by 49 Stat. 1189; 45 U. S. C. 151) must be interpreted and applied to a continuing employment relationship, is not exclusive primary jurisdiction vested in the appropriate adjustment board created pursuant to the Railway Labor Act in accordance with the doctrine of the *Slocum* case, *supra?*

II.

Does the Universal Military Training and Service Act (50 U. S. C. 459) prohibit an employer and his employees from entering into a good faith contract providing that each employee's progress up the wage ladder shall be only in accordance with his *actual* service with the employer and that time spent on leaves of absence (military and non-military alike) shall not be counted in determining the employee's position on the wage ladder?

III.

Where an employee is in a probationary status with his employer at the time he enters the military service, and consequently is subject to discharge without cause and without recourse to the contractual grievance procedure, is such employee not occupying a "temporary position" and therefore entitled to no reemployment rights under the Universal Military Training and Service Act?

Statutes Involved

Universal Military Training and Service Act, 50 U. S. C. 459:

"Sec. 9 (a) Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4 (b), shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained.

• • • • •

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

• • • • •

"(B) if such position was in the employ of a private employer, such person shall—

"(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

"(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

"(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

"(2) It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

"(d) In case any private employer fails or refuses to comply with the provisions of subsection (b), subsection (c) (1) or subsection (g), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided*, That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it

on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further*, That only the employer shall be deemed a necessary party respondent to any such action.

* * * * *

"(g) (1) Any person who, subsequent to June 24, 1948, enlists in the Armed Forces of the United States (other than in a reserve component) and who serves for not more than four years (plus any period of additional service imposed pursuant to law) shall be entitled upon release from service under honorable conditions to all the reemployment rights and other benefits provided for by this section in the case of persons inducted under the provisions of this title.

"(2) Any person who, subsequent to June 24, 1948, enters upon active duty (other than for the purpose of determining his physical fitness), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon his relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided by this section in the case of persons inducted under the provisions of this title, if he is relieved from active duty not later than four years after the date of entering upon active duty or as soon after the expiration of such four years as he is able to obtain orders relieving him from active duty."

Railway Labor Act, 45 U. S. C. 151:

> "Sec. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.
>
> "It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act."

STATEMENT OF THE CASE

This is an action for improved employment status under the Universal Military Training and Service Act.

Plaintiff Moe alleges that he was employed by defendant Eastern as a co-pilot on August 4, 1950, that he left Eastern's employ to enter the Armed Forces on March 1, 1951, and that he was reinstated in Eastern's employ as a co-pilot on December 1, 1952, after being honorably discharged from the military service.

Moe further alleges (R. 34) that, upon reinstatement, he was given "the same status and seniority except for purposes of pay that plaintiff would have enjoyed had he continued in the employment of defendant continuously from the time of plaintiff's entering the armed forces until

the time of his reinstatement to his employment with defendant . . ." What Moe refers to as "seniority except for purposes of pay" will be referred to herein as "seniority" or "ordinary seniority."

Moe alleges that he should be given credit for pay purposes (hereinafter referred to as "pay seniority") for the period of his military service, March 1, 1951 to December 1, 1952. Since Eastern has denied such pay seniority credit, Moe has brought this action to obtain such credit and to obtain damages alleged in the amount of $5,500.

Eastern filed a motion to dismiss and for summary judgment (R. 4) stating that Moe had failed to state a claim against Eastern upon which relief can be granted and that exclusive primary jurisdiction is in the Eastern Air Lines Pilots' System Board of Adjustment created by agreement between Eastern and the Air Line Pilots Association (hereinafter referred to as "the ALPA") which is Moe's exclusive bargaining representative pursuant to the Railway Labor Act, 45 U. S. C. 151.

Attached to Eastern's motion was an affidavit of Mr. Sidney L. Shannon (R. 6) together with copies of the applicable agreements between Eastern and the ALPA, pertinent portions of which are contained in the printed record (R. 8-29).

Moe also filed a motion for summary judgment (R. 28), together with an affidavit (R. 30). Certain admissions and a stipulation were also considered by the court in ruling on the motions for summary judgment.

The trial court granted Eastern's motion for summary judgment (R. 53-58), and denied Moe's motion. The trial court found in substance as follows:

(1) That Moe was a probationary employee at the time he entered the military service, and that therefore under the applicable contractual provisions he was a "temporary employee" who was not entitled to reemployment rights under the Act.

(2) That the applicable contract provisions established a "step-rate system of compensation" (designated in the Eastern-ALPA contract as "seniority for pay purposes"), of the same type considered in *Altgens* v. *Associated Press*, 188 F. 2d 727 (5th Cir. 1951); that " 'seniority' and 'seniority for pay purposes' are entirely different terms"; and that Moe was not entitled to have his military service credited as "seniority for pay purposes" or "pay seniority" as that term is used herein.

On appeal by Moe, the Court of Appeals reversed, holding that Moe was not a temporary employee, that the Act requires Eastern to give Moe pay credit (*i.e.*, advanced position on the wage ladder) for the period of his military service even though the applicable collective bargaining agreement provides to the contrary, and that the trial court had primary jurisdiction to decide the matter to the exclusion of the Adjustment Board.

The asserted basis for Federal jurisdiction in the court of first instance was Section 9 (d) of the Universal Military Training and Service Act, quoted above, which gives to the District Court power to require an employer to comply with the provisions of that Act. As explained in detail hereinafter, Eastern submits that the District Court did not in fact have jurisdiction for the reason that the Railway Labor Act, as construed by this Court in the *Slocum* case, *supra*, and other similar cases, confers exclusive primary jurisdiction on the Eastern Air Lines Pilots System Board of Adjustment, and any jurisdiction of the District Court cannot attach until the Adjustment Board has acted. Since Moe did not submit his dispute or grievance to the Adjustment Board, Eastern believes that the trial court lacked jurisdiction.

ARGUMENT

I.

Exclusive primary jurisdiction of Moe's complaint belongs to the System Board of Adjustment, and therefore the trial Court lacked jurisdiction.

As will be seen from Section 30 of the contract between Eastern and the ALPA (R. 28), Moe is entitled to have any "grievance concerning any action of the Company" handled in accordance with the procedure established in Section 29. The procedure established in Section 29 provides (R. 27) for appeals within the Company and then "further appeal" to the Eastern Air Lines Pilots' System Board of Adjustment. The agreement establishing the Eastern Air Lines Pilots' System Board of Adjustment is set forth at pages 8-15 of the printed Record.

The System Board of Adjustment was created by that agreement in accordance with the specific requirement of Section 204 of the Railway Labor Act (45 U. S. C. 184) that "it shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a Board of Adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act."

As established by Mr. Shannon's affidavit (R. 7), Moe at no time attempted to follow the procedure outlined in Sections 29 and 30 of the contract, and he did not at any time submit his complaint to the System Board of Adjustment.

It is now firmly established that the Adjustment Board procedure is the *exclusive* primary remedy for any "grievance" except of an employee who has been discharged. In *Slocum* v. *Delaware L. & W. R.R.*, 339 U. S. 239 (1950), this Court referred to its previous decision in *Order of Railway*

Conductors v. *Pitney*, 326 U. S. 561 (1946), and stated the law applicable to this type case as follows (339 U. S. 243-245):

"The paramount importance of having these chosen representatives of railroads and unions adjust grievances and disputes was emphasized by our opinion in Order of Conductors v. Pitney, supra. There we held, in a case remarkably similar to the one before us now, that the Federal District Court in its equitable discretion should have refused 'to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents * * *.' Our ground for this holding was that the court 'should not have interpreted the contracts * * *' but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field. 326 U. S. at pages 567-568, 66 S. Ct. at page 325, 90 L. Ed. 318. This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act.

"Our holding here is not inconsistent with our holding in Moore v. Illinois Central R. Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board.

"(5) We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here in-

> volved is exclusive. The holding of the Moore case does not conflict with this decision, and no contrary inference should be drawn from any language in the Moore opinion."

To make it entirely clear that *all* "grievance" matters must be submitted to the Adjustment Board, this Court simultaneously decided the case of *Order of Railway Conductors* v. *Southern Railway*, 339 U. S. 255 (1950), which, in this Court's language (339 U. S. 256), involved a dispute "concerning the railroad's obligation under the collective-bargaining agreement to give conductors extra pay for certain services." This Court went on to hold as follows:

> "For reasons set out in the Slocum case, . . . we hold that the South Carolina state court was without power to interpret the terms of this agreement and adjudicate the dispute."

Here, as in the *Slocum* and *Southern Railway* cases, a court must interpret the collective bargaining agreement in order to settle the dispute involved in this litigation. Moreover, just as in the *Slocum* and *Southern Railway* cases, a continuing employment relationship exists between Moe and Eastern and the decision would "involve questions of future relations between the [airline] and its other employees." It must follow, therefore, as this Court held in the *Slocum* case, that "the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive."

It is recognized, of course, that the Universal Military Training and Service Act confers on the District Courts jurisdiction to enforce the reemployment rights of returning veterans. This is specifically set out in Section 9 (d) of the Act which states that if the employer "fails or refuses to comply with the provisions of subsection (b) or subsection (c) (1), the district court of the United States . . . shall have power . . . specifically to require such employer to comply with such provisions . . ." This statutory

language gives the court power to *enforce compliance*, but it does not specifically state that the court is to determine what is compliance or whether the employer has already complied.

It is completely consistent with the language of the Act to say, as the courts have held in other connections involving the principle of the *Slocum* case, that primary *exclusive* jurisdiction to determine the substantive issues involved in grievances must be exercised by the Adjustment Board, and the court has jurisdiction only to enforce compliance with the awards of the Adjustment Board. This function of the court is specifically spelled out in Section 3 First (p) of the Railway Labor Act (45 U. S. C. 153) which states that "if a carrier does not comply with an order of a division of the Adjustment Board . . . the petitioner . . . may file in the District Court a petition . . . The district courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Recent decisions which also hold that matters of contract interpretation and continuing employment relationships must be submitted to adjustment boards are *Cruser* v. *United Air Lines*, 141 F. Supp. 347 (D. Colo. 1956), *affirmed*, 239 F. 2d 863 (10th Cir. 1956) and *Alabaugh* v. *Baltimore & O. R.R.*, 222 F. 2d 861 (4th Cir. 1955). In the *Alabaugh* case it is made entirely clear that the Adjustment Board has exclusive jurisdiction even where matters of statutory and constitutional rights are to be decided.

Harmonizing the provisions of the Universal Military Training and Service Act with the provisions of the Railway Labor Act and the decision of this Court in the *Slocum* case, it seems clear that exclusive primary jurisdiction to interpret the contract and determine Moe's rights must be exercised by the Adjustment Board, and the court's jurisdiction could attach only upon failure or refusal by Eastern

to comply with the decision of the Adjustment Board. Precisely this procedure was followed in *Brotherhood of Railway and Steamship Clerks* v. *Railway Express Agency*, 29 Labor Cases 69,574 (S. D. Ohio 1955).

The basic principle here involved was recognized in *United States ex rel. Deavers* v. *Missouri, K. & T. R.R.*, 171 F. 2d 961, 963 (5th Cir. 1949), as follows:

> "We do not think Section 8 is to be construed as substituting the court for the Adjustment Board in settling the cross grievances arising among these railroad employees. The Court's duty is to ascertain the facts as to the veteran's former employment, his entrance into the military service and proper discharge therefrom, his timely application for restoration, and whether he has a right to have his former employment with due seniority, as against his employer. That much it can settle. Disputes between him and fellow employees as to what his seniority is as against them must take their usual course, especially when thus belatedly raised. The Adjustment Board, it may be presumed, will give effect to the judgment of the court, if so rendered, that Deavers was and is as a veteran entitled to full restoration as to seniority, but the Board can better determine what in detail that seniority was and is, and how it is to be effected under the collective agreement with the firemen."

What was then said with respect to the exclusive jurisdiction of the Adjustment Board is believed to be eminently sound. One qualification which appears to be necessary in view of the later decision of the Supreme Court in the *Slocum* case is that the Adjustment Board's jurisdiction must be invoked prior to any court action, and that the only basis on which the court could intervene would be failure or refusal by Eastern to grant to Moe the seniority rights which the Adjustment Board might find him to be entitled to in accordance with the Act.

It may be suggested that here there is no dispute as to the meaning of the collective bargaining agreement and

that therefore the court need not interpret the contract, but must merely apply the law to undisputed facts.

However, the Court of Appeals proceeded to interpret the contract, stating its conclusion (unsupported by any evidence or affidavit) that (Appendix A, p. 46) "the increased wage rate was not intended to be related peculiarly to proficiency." Certainly if the intention of the parties concerning the operation of the wage provisions is to be determined by anyone, it must be determined by the tribunal created by the Railway Labor Act precisely for that purpose—*i.e.* the Adjustment Board. Otherwise, the Court is interfering in a "continuing employment relationship" contrary to this Court's holding in the *Slocum* case, *supra*, and other similar cases.

But whether or not the interpretation of the contract is undisputed, the fact remains that there is a "grievance" or "dispute" between Moe and Eastern of the type which is subject to the jurisdiction of the Adjustment Board, and this Court has said, in the *Slocum* case, *supra*, that "the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive."

Even if the law were held to override the clear contractual language, reference to and interpretation of the contract would still be necessary in order to find exactly how much back pay would be due and what position on the pay seniority scale Moe should occupy for the future. These are matters for the Adjustment Board—not the court. *See United States ex rel. Deavers* v. *Missouri, K. & T. R.R.*, *supra*.

Since Moe has failed to take his complaint to the Adjustment Board, the trial court lacked jurisdiction.

II.

Moe's rights are governed by a contract which properly denies him pay seniority for time on furlough or leave of absence.

The question under this heading is, basically: Does the Act prohibit an employer and his employees from entering into a good faith contract providing that each employee's progress up the wage ladder shall be only in accordance with his *actual* service with the employer and that time spent on leaves of absence (military and non-military alike)* shall not be counted in determining the employee's position on the wage ladder.

There can be no doubt but that the parties to the contract meant to give Moe "pay seniority" credit only for *actual* service.

Section 11 (b) of the contract between Eastern and the ALPA in effect at the time Moe was employed and in effect at the time he was reinstated by Eastern as a co-pilot following his military service (R. 20) provided specifically that a co-pilot's "seniority for pay purposes is to be computed on the actual length of service as a pilot with the Company, except as provided in this agreement."

The single exception to the requirement of "actual length of service" is contained in Section 22 (f) of the same contract (R. 25) as follows: "Pilots who have completed their probationary period in accordance with Section 20 [*sic;* should be Section 21] of this Agreement shall in addition

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* The contract provides (Section 22 (f); R. 25) that non-probationary pilots on military leaves shall be given credit for military service in progressing up the wage ladder. This clearly is a *special contractual benefit* for *permanent* employees on military leave, and does not detract from the basic equality between probationary employees on military leave (such as Moe) and *all* probationary and non-probationary employees on *non-military* leaves of absence.

to retaining their position on the seniority list, accrue seniority for pay purposes" during periods of active military service referred to in the contract. Thus it is clear that pilots who have passed their probationary period "accrue" pay seniority while in the military service, but probationary pilots do not accrue pay seniority while on military leave, and no co-pilot accrues pay seniority except in accordance with "actual length of service as a pilot with the Company" with the single exception of *non-probationary* pilots who are on *military* leave.

As the trial court correctly concluded, and is apparent from Sections 11 (b) and 22 (f) of the contract (R. 20, 25), progression in "pay seniority" or "the step-rate system of compensation" is dependent on "actual length of service as a pilot with the Company," and experience with other employers and mere passage of time will not suffice. It is true that in the case of ordinary seniority (with certain exceptions—see Sections 22 (a) and 25 (c), R. 24 and 26) accruals occur in accordance with passage of time. But the parties to this contract very clearly drew a distinction between ordinary seniority and pay seniority, and the uniform practice as shown by Mr. Shannon's affidavit (R. 7-8) has recognized that distinction.

As will be seen from Section 9 (c) (1) of the Act, quoted above, an employee on military leave is to be "considered as having been on furlough or leave of absence," and all benefits offered him on reinstatement are to be "pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces." Thus it is clear that Moe's rights are to be determined by the contract between Eastern and the ALPA, and not by any standard imposed from the outside which might afford him "super seniority."

Not only does the Act itself clearly show that the contract is to govern, but the court decisions support the proposition that rights of veterans are to be determined

in accordance with the applicable contract and practices prevailing at the time the employee entered the Armed Forces. This proposition is most clearly stated in *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 526-528 (1949) as follows:

> "In other words, the Act gives him the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force on whose behalf successive collective agreements are made. In this way the Act protects the furloughed employee from being prejudiced by any change in the terms of a collective agreement because he is 'on furlough', but he is not to be favored as a furloughed employee as against his fellows. This is the essence of our decision in Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, 167 A. L. R. 110.
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> "Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry. See Trailmobile Co. v. Whirls, 331 U. S. 40, 53, note 21, 67 S. Ct. 982, 988, 91 L. Ed. 1328. There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations.
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> "Kirk's rights, including seniority, before he entered the service were derived from the agreement of 1941. So, likewise, were his rights, including seniority, as an employee on furlough defined by the agreement of 1945, inasmuch as that agreement in no wise disadvantaged his position because he was in the military service."

What Moe is seeking in this proceeding is "to be favored as a furloughed employee as against his fellows," inasmuch as no other furloughed co-pilot would accrue pay seniority under the contract with the single exception of non-probationary employees on military furlough. Thus, Moe's complaint flies in the teeth of this Court's decision in the *Campbell* case. See also *Harrison* v. *Seaboard Air Line R.R.*, 77 F. Supp. 511 (E. D. S. C. 1948).

The specific question involved in this case was decided the opposite way by the lower court in *Altgens* v. *Associated Press*, 188 F. 2d 727 (5th Cir. 1951). As in this case, the *Altgens* case involved "pay seniority" although the term is not used in that case and probably is not generally used outside the airline industry. However, the principle of "pay seniority" clearly was involved in the *Altgens* case since the court's opinion points out that the employer there had a "step-rate system of compensation" such as is provided in the contract between Eastern and the ALPA, and the specific question involved in the *Altgens* case was whether military service should be credited for purposes of determining the pay bracket in which the employees should be placed. The trial court correctly held in the instant case (R. 56) that "seniority for pay purposes" and "step-rate system of compensation" mean the same. Pertinent portions of the opinion in the *Altgens* case follow (188 F. 2d 729):

> "We can find no evidence in the record of any other intention of the parties than that progression up the step-rate ladder would be based solely upon actual on-the-job wire-photo experience, and not upon seniority.
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"The step-rate system of compensation is something entirely separate and distinct from seniority. Seniority begins when an employee's pay begins, and continues so long as he is in the employment, regardless of whether he is laid off, on vacation, or (by the terms of the Act under which this suit was brought) in the military service.

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"The step-rate system places a monetary value on experience. Both appellants in this case testified that wirephoto work requires a certain knowledge, dexterity, special skill, and proficiency, which comes only from experience on the job. The appellants contend that, because no test or examination is given before each progression, the resulting pay increases are automatic with the passing of time, and therefore the step-rate system is synonymous with seniority; and they also contend that the provision of the statute for veterans to be credited with seniority from time spent in military service requires that they be given credit in the step-rate system for their time spent in military service. We cannot follow appellants' contention, because we are convinced that progress in this step-rate system was intended to be based solely upon wirephoto experience. Time spent in the service of our armed forces, however, praiseworthy it may be, is not necessarily wirephoto experience in any sense of the word, and we can find no language in the statute which authorizes us to call it such.

"(2) The Act by its terms requires the returning service man to be 'considered as having been on furlough or leave of absence' during his military service, and clearly does not require him to be put in a position, when he returns, that he could not have attained had he not had a certain amount of experience. The findings below, that appellants were given all of the rights to which they were entitled under the Act, were amply supported by the evidence. The judgment appealed from is affirmed."

It should be emphasized that there is in this case precisely the same distinction between "seniority" and the "step-rate system of compensation." The latter term is synonymous with "pay seniority" as used in this case.

Similarly, in *Poore* v. *Louisville & N. R.R.*, 235 F. 2d 687 (5th Cir. 1956) the court had the following to say:

> "The Act was not intended to give the veteran preference. It was intended to assure equality. Where, in technical and skilled employment, actual experience is an expressed requirement to advancement, the Act does not mean to give that effect to mere passage of time."

Brown v. *Denver Post*, 145 F. Supp. 351 (D. Colo. 1956), is another recent decision involving a "step-rate system of compensation" similar to that here involved. The court there concluded "that a returning veteran is not entitled by force of the benefits given to him under the terms of the Selective Service Act, and its successor, to enjoy the salary increases of a step-rate system founded upon actual experience gained by on-the-job employment, when he has in fact gained no such experience while in the military service."

A similar unreported case is *Sadkin* v. *Pioneer Airlines, Inc.*, Civil Action No. 5583, in the United States District Court for the Northern District of Texas, Dallas Division. There, as here, the employee was a pilot who claimed pay seniority rights as a result of military service. There, as here, the contract provided that seniority for "base pay or salary purposes shall not accrue" during leaves of absence—in fact, in that case there was not the sharp distinction between probationary pilots and other pilots, as all pilots were denied pay seniority accruals while on leave of absence. The court there granted judgment for the defendant employer.

On the authority of all previous pertinent decisions, and the clear language of the contract between Eastern and the ALPA, plus the established practice as outlined in Mr. Shannon's affidavit (R. 7-8), it is submitted that Moe is not

entitled to accrued "pay seniority" or "step-rate compensation" for the time which he spent in the military service. See also to the same effect *Nevins* v. *Curtiss-Wright Corp.*, 172 F. 2d 535 (6th Cir. 1949) and *Zaversnik* v. *Union Pacific R.R.*, 95 F. Supp. 209 (D. Wyo. 1949).

It should be reemphasized that the contract between Eastern and the ALPA provides in Section 11 (b) that (R. 20) "seniority for pay purposes is to be computed on the *actual length of service as a pilot with the Company.*" It is obvious that military service is not "actual" service "with the Company." A similar situation was presented in *Selgrat* v. *Field Enterprises*, 105 F. Supp. 179, 182 (N. D. Ill. 1952), where the court summarized its holding as follows:

> "He cannot, however, derive only the benefits from this agreement; he must also accept the condition as to 'actual experience.' This condition, namely that only actual experience in the newspaper field will be credited toward seniority, does not, in the Court's view, discriminate against the veterans; it applies to all employees alike. A condition of this type in a collective bargaining agreement, so long as it does not discriminate against the veteran, does not violate the provisions of the Act."

See also *Fries* v. *Pennsylvania R.R.*, 195 F. 2d 445, 447 (7th Cir. 1952), where the court disposed of a similar issue in the following language:

> "Plaintiff contends that the time which he spent in the service should be counted as days 'actually worked' at least to the extent of crediting him with having actually worked 528 days. We find no support in the cases or in the Act for such a theory."

Moe's contention that, once he has completed his probation, he is entitled to have his pay seniority dated back to the time he first was employed by Eastern, is answered by the foregoing authorities. The net effect of such a "push

back" principle would be the same as allowing him to accrue "pay seniority" for military service, contrary to the contract and to the above authorities.

The "push back" theory has been presented in several cases and vigorously rejected by the courts. See *Harvey* v. *Braniff International Airways*, 164 F. 2d 521 (5th Cir. 1948); *Bostian* v. *Seaboard Air Line R.R.*, 211 F. 2d 867 (4th Cir. 1954); and *Hall* v. *Louisville & N. R.R.*, 18 Labor Cases 65,916 (W. D. Ky. 1950).

The Court of Appeals apparently placed great reliance on Section 9 (c) (2) of the Universal Military Training and Service Act, and also on *Oakley* v. *Louisville & Nashville Railroad*, 338 U. S. 278 (1949) and *Diehl* v. *Lehigh Valley Railroad*, 348 U. S. 960 (1955). Apparently the Court of Appeals thought that the statutory language in Section 9 (c) (2) and the principles announced in the *Oakley* and *Diehl* cases (all of which appear to relate only to *ordinary seniority*) entitle Moe to any promotions or length of service raises which he would have received if he had remained in the active service of the Company throughout his military service. It is submitted that such is not a proper interpretation of the statute or the cited court decisions.

Section 9 (c) (2) of the Act provides as follows:

> "It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

It should be remembered that this language follows immediately after Section 9 (c) (1), quoted above, which provides that the employee "shall be considered as having been on furlough or leave of absence during his period of

training and service in the armed forces" and shall be entitled to all benefits in accordance with "established rules and practices relating to employees on furlough or leave of absence." It will be seen at once that if Section 9 (c) (2) were interpreted as the lower court held, there would be an irreconcilable conflict between Section 9 (c) (2) and Section 9 (c) (1), inasmuch as Section 9 (c) (1) requires Eastern to treat Moe as having been on furlough and Section 9 (c) (2), under the lower court's interpretation, would require Eastern to treat him as if he had never been on furlough but had been in the active service throughout and therefore entitled to all increases in pay which derive from active service. It is inconceivable that Congress intended to create such a conflict within the narrow confines of Section 9 (c).

The precise language, and the entire background, of Section 9 (c) (2) demonstrate that Congress did not intend to nullify Section 9 (c) (1) when it adopted Section 9 (c) (2) in 1948. In the first place, it will be noted that Section 9 (c) (2) says simply that the employee "should be restored in such manner as to give him such *status* in his employment as he would have enjoyed if he had continued in such employment continuously . . . " Inasmuch as Section 9 (b) of the Act requires that the employee be restored "to a position of like seniority, status and pay," the fact that Congress used only the word "status" in Section 9 (c) (2) is significant. Certainly if Congress had intended that Moe be restored "in such manner as to give him such *pay* . . . as he would have enjoyed if he had continued in such employment continuously," Congress would have said so.

That Congress deliberately chose *not* to give Moe by statute a *pay* increase which did not follow automatically from ordinary seniority, is apparent from the legislative history of Section 9 (c) (2). The language of Section 9 (c) (2) came from the Senate Bill considered by the Congress in 1948 (S. 2655). Congress specifically rejected

the language of the House Bill (H. R. 6401), which provided that those restored to positions pursuant to the terms of the Act would be given "all promotions, increases in pay, vacation rights, and accumulations of seniority to which they would have been entitled if they had been working in their old positions during their periods of service." This is set forth in the statement of the managers on the part of the House in Conference Report No. 2348, June 14, 1948, which appears at 94 Cong. Rec. 9253-9268, 80th Cong., 2d Sess. (1948). See also United States Code Congressional Service (1948) pp. 2016-2017.

Since Congress adopted the language of the Senate Bill and rejected the very specific language of the House Bill, it must be concluded that Congress did not intend to give to returning veterans the "promotions, increases in pay" and other rights which they would have received "if they had been working in their old positions during their periods of service." If Congress had meant anything like that, it obviously would have selected the language of the House Bill rather than the language of the Senate Bill which gives only seniority "status" rights growing out of the continued employment relationship, and which must be construed as being consistent with the language of Section 9 (c) (1) which treats the veteran as being on furlough or leave of absence.

Moreover, it is apparent that all Congress meant in enacting Section 9 (c) (2) was to give specific Congressional approval to the "escalator principle" which had been announced in previous decisions of some of the courts. See, for example, the explanation by the Senate Committee Report (S. Rept. No. 1268, May 12, 1948), where the explanation of Section 9 (c) (2) is prefaced by the words "statement of policy regarding application of the 'escalator principle.'"

The "escalator principle" originated in *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U. S. 275 (1946), where the Court held that the effect of the original 1940 Act was to

maintain the veteran in his employment relationship with the employer throughout his military service to the extent that he retained and continued to accrue seniority. The seniority there discussed was simply the employee's status in relation to other employees for purposes of lay-off and other matters relating to job security.

This Court later, in the *Oakley* case, *supra*, interpreted the *Fishgold* decision as having held that a veteran was entitled "to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment." However, it should be emphasized that in the *Oakley* case this Court also stated that "his seniority status secured by this statutory wording continued beyond the first year of his reemployment, *subject to the advantages and limitations applicable to the other employees*" (emphasis added). The decisions in both the *Fishgold* case and the *Oakley* case make clear that the veteran is entitled only to be treated the same as other employees, and that he is not entitled to "super seniority" or any other rights superior to persons on non-military leaves of absence or other non-military status.

In contrast with the weight which the Court of Appeals gave the *Oakley* decision, it should be noted that, when the *Oakley* case was remanded to the District Court by this Court, the District Court stated in granting summary judgment for the employer that "The Act by its terms requires the returning veteran to be 'considered as having been on furlough or leave of absence during his military service' and clearly does not require him to be accorded a status which he would not have achieved *in absentia*, but only by actual work on the job." See *Oakley* v. *Louisville & Nashville Railroad*, 19 Labor Cases 66,132 (E. D. Ky. 1951).

Thus it is clear that what both this Court and Congress meant by the expression "if he had remained con-

tinuously in his civilian employment" was simply that the employee should be given the same seniority status as if he had remained in a continuous employment relationship (as would be true in case of "furlough or leave of absence") with his employer throughout his military service. Obviously neither Congress nor this Court meant that promotions or wage increases dependent on length of actual service must be granted under the law regardless of the requirements or provisions of the employment contract.

Prior to the decision below, the "escalator principle" had never been construed to require automatic *pay increases* or automatic *promotions* contrary to established practices or existing collective bargaining agreements. The escalator principle applies only to ordinary seniority (*i.e.*, job security) and such benefits as are automatically conferred as a result of such ordinary seniority under existing practices or agreements. That principle had never before been applied by any court to require pay increases contrary to the terms of a contract requiring service on the job as a condition of advancement.

The *Diehl* case, relied upon by Moe, does not change the law in this respect. The *Diehl* decision is *per curiam*, merely referring to the opinion of the Court of Appeals, "the applicable acts of Congress, and the opinion of this Court in Oakley . . ."

The reliance on the *Oakley* case would appear to indicate that there was no intent to change the law as stated in that case. It will be remembered that the *Oakley* decision related only to ordinary seniority, not to pay seniority or promotions. Therefore, it must have been the Supreme Court's belief that the facts in the *Diehl* case called for automatic credit for ordinary seniority. Reference to the decision of the Court of Appeals for the Third Circuit (211 F. 2d 95) supports this apparent belief.

The *Diehl* case did not involve any claim for increased pay or pay seniority, and it did not involve any claim for

a promotion based on military service. The only claim by Diehl was that, once he had completed the required period of experience as a "car man mechanic," he should be given ordinary seniority credit as a "car man mechanic" as if his employment had not been interrupted by his war service.

The Court's attention is called to the very careful analysis of the *Diehl* case written by Chief Judge Nordbye in *Sularz v. Minneapolis, St. P. & S. S. M. R.R.*, 148 F. Supp. 83, 91-92 (D. Minn. 1956). As Judge Nordbye points out, "Diehl was advanced to a position equivalent to car man mechanic prior to entering the Armed Forces," and he returned to the same job after his military service. After he had already completed 1160 days experience in that position, the employer and the union negotiated a contract with retroactive effect, providing that only actual experience on the job could be given seniority credit. Until that time, there was no indication that "any practical experience or on-the-job training" was necessary to accrue seniority. As Judge Nordbye summarized the situation:

> "Diehl was in a certain position on the temporary carmen mechanics' seniority roster at that time. Then the company and the Union chose a method of determining the seniority status of men on the temporary carmen mechanics' roster which was not based upon the order of their promotion to temporary carmen, but was based upon the order of their completion of 1,160 days of work as a temporary carman mechanic. Such a retroactive requirement of on-the-job experience as a temporary carman mechanic which resulted in the placing of non-veterans who were lower on the temporary carmen mechanics' list above the veteran Diehl on the roster because he was absent for a time in the military service, was held by the Supreme Court to be discriminatory and contrary to the Selective Training and Service Act's requirements."

Attention is also called to the detailed study of this subject contained in Sherman, "Seniority and Promotion Rights of Reemployed Veterans," 17 Pitt. L. Rev. pp. 20-41

(1955), where the author concludes that the *Diehl* decision has "added nothing to the existing body of law with respect to the reemployment rights of veterans," and has not changed any of the principles established in prior decisions. The author also concludes that Section 9 (c) (2) of the Act "grants no greater rights to veterans" than were available under previously established principles of law—a conclusion with which Judge Nordbye agrees in the *Sularz* case (148 F. Supp. 92) and with which Chief Judge Knous agrees in *Brown* v. *Denver Post, supra.*

The Court of Appeals appears (Appendix A, p. 47) to assume that this Court's *per curiam* reversal of the Court of Appeals in the *Diehl* case denoted an affirmance of that court's conclusion that there is "an irreconcilable conflict between the 'continuous employment' test and the 'furlough or leave of absence' test," and a determination by this Court that the "continuous employment" test overrides the "furlough or leave of absence" test. That assumption of the court below seems wholly unjustified in view of the fact that the "continuous employment" test (or "escalator principle") has always been a part of the "furlough or leave of absence" test and was enunciated by this Court many times before it was incorporated in the 1948 amendment to the Act. We respectfully submit that this Court's action in the *Diehl* case represents a holding that there is no "irreconcilable conflict" between the two supposed tests (which in fact are one) and that Diehl's *ordinary seniority* (as distinguished from "pay seniority" or position on the wage ladder) accrued during his military service pursuant to established rules and practices which existed before and during such service.

Neither the *Diehl* case nor any other case which had been decided up to the decision below holds or even suggests that, contrary to the clear provisions of a collective bargaining agreement, a returning veteran must be given pay increases or promotions on the basis of his military service plus actual on-the-job experience.

The Court of Appeals speculates (Appendix A, p. 46) that "the increased wage rate was not intended to be related peculiarly to proficiency" under the contract between Eastern and the ALPA. Such a conclusion, even if accurate,* would be wholly beside the point. The parties have made it absolutely clear that actual on-the-job experience is the criterion by which pay raises are to be determined whether experience creates "proficiency" or not. There is nothing in the law to prohibit such a contractual criterion so long as it applies to non-military employees as well as veterans and does not discriminate against the veterans.

Certainly no one could contend that actual flying experience is unimportant in an industry such as air transportation which depends for its public acceptance entirely on its ability to provide safe transportation. It is true, of course, that the parties have made an exception in the case of non-probationary pilots, as such pilots are given pay seniority credit for their military service. However, this special benefit for veterans is accorded only those who have passed their probationary period and thus have a minimum of one year's flying experience plus the vote of confidence which is implicit in the employer's accepting them for permanent employment.

From the foregoing, it is clear that Moe's rights are governed by the contract and that he therefore is not entitled to "pay seniority" credit for the period of his military service.

* As noted above, the accuracy or inaccuracy of such an interpretation is within the exclusive jurisdiction of the Eastern Air Lines Pilots System Board of Adjustment and cannot be properly determined by a court under the doctrine of the *Slocum* case, *supra*, and other well-established precedents. Moreover, where the parties have deliberately keyed wage advancements to actual on-the-job experience, the presumption would seem to be that experience was deemed to create "proficiency" which, in turn, would merit additional compensation. The fact that no wage credit is given for service on other airlines does not detract from this conclusion, as the operating practices and problems of various airlines obviously are different, as their aircraft, routes, and other conditions are different.

III.

Moe was a temporary employee when he entered the armed forces and therefore has no reemployment rights under the Act.

The applicable provision of the contract between Eastern and the ALPA which was in effect during the period here in question is Section 21 (R. 24) which states as follows:

> "Section 21. A co-pilot shall be on probation for an aggregate of the first twelve months of his service on flying status as a co-pilot with the Company."

The effect of the co-pilot's being on probation is highlighted by Section 29 of the contract between Eastern and the ALPA (R. 27), which provides in paragraph (a) as follows:

> "1. A pilot shall not be disciplined or dismissed from the Company without notification in writing as to any such action and such pilot shall not be disciplined or dismissed without an investigation and hearing provided that the pilot makes written request for an investigation and hearing within seven days after receiving such notification."

Section 29 (c) provides the following exception (R. 27) with respect to the right to investigation and hearing:

> "2. Nothing in this Agreement shall extend the right of investigation and hearing to a co-pilot during his probationary period as stipulated in Section 21."

The net effect of the provisions of Section 29 is that a pilot who has passed his probationary period may demand a hearing upon being discharged and may be reinstated as a result of such a hearing; but a co-pilot who is in his probationary period has no right to a hearing and may be dis-

charged at any time with or without cause and without the right of appeal.

Under similar contracts dealing with probationary periods of employees, the courts have uniformly held that the probationary employee holds "a temporary position" and therefore has no re-employment rights under the Act.

A case which is closely similar to this one, and which summarizes the law on the subject, is *Venzel* v. *United States Steel Co.*, 209 F. 2d 185 (6th Cir. 1953), *cert. denied*, 348 U. S. 838 (1954). There, the comparable provision of the contract provided as follows:

> "New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first three (3) months of their employment and will receive no continuous service credit during such period. Probationary employees may be laid off or discharged as exclusively determined by Management, provided that this provision will not be used for purposes of discrimination because of membership in the Union. Probationary employees continued in the service of the Company subsequent to three (3) months from date of original hiring shall receive full continuous service credit from date of original hiring."

Venzel entered the military service during his three months probationary period, and upon his return to employment with U. S. Steel contended that upon completing his probationary period he was entitled to have his seniority dated back to the time he was originally employed.

The court held as follows:

> "We agree with the view expressed by the District Judge, namely, that the amended complaint states the material facts which are not in dispute, thus presenting a pure question of law for the court; that in determining whether or not the appellant left a position other than a temporary position when he was inducted

into service, we must consider the status of the particular employee in the position which he then occupied rather than the permanency of the job which may at times be filled by either a permanent or a temporary employee. Salzman v. London Coat of Boston, Inc., 1 Cir., 156 F. 2d 538; that in determining this question we must consider the provisions of the collective bargaining agreement in effect during the period of his employment prior to his entrance into the military service; that in the present case, a probationary employee is a temporary employee; and that in leaving his position before the completion of his probationary period, he did not leave 'a position other than a temporary position', within the meaning of the Act, and accordingly did not qualify for the benefits provided by the Act. Lesher v. P. R. Mallory & Co., Inc., 7 Cir., 166 F. 2d 983; Johnson v. Interstate Transit Lines, D.C., Utah, 71 F. Supp. 882, affirmed 10 Cir., 163 F. 2d 125; Doyle v. Division No. 1127, etc., D.C. La., 76 F. Supp. 655, affirmed 5 Cir., 168 F. 2d 876; Meredith v. Industrial Rayon Corp., D.C.N.D. Ohio 1949, 117 F. Supp. 815."

Lesher v. *Mallory & Co.*, 166 F. 2d 983 (7th Cir. 1948), cited by the court in the *Venzel* case, involved the same type of probationary period during which "the defendant had the right to discharge the employee with or without cause and without interference on the part of the union" (166 F. 2d 984). The court there held that probationary employees were on a "trial basis" and therefore "temporary" within the meaning of the Act.

The other cases cited by the court in the *Venzel* case all hold to the same effect, and no cases to the contrary have been found prior to the decision below in this case.

Moe argues that the term "temporary position" must be construed to apply only to positions which are temporary in nature, and cannot apply to positions which are permanent, but are held by employees with only "temporary" status. Aside from the fact that the interpretation urged

by Moe would practically destroy the effectiveness of the statutory exception of "temporary positions," this particular interpretation has been presented to the courts many times and has been unanimously rejected by those courts which have considered it. As will be noted from the decision in the *Venzel* case, *supra*, that court stated that "we must consider the status of the particular employee in the position which he then occupies rather than the permanency of the job which may at times be filled by either a permanent or a temporary employee."

The same question has been considered at length by the court in *Lesher* v. *Mallory & Co.*, *supra*, as follows (166 F. 2d 986):

> "The interpretation to be given to the words 'temporary position' has been considered by a number of courts. It has been held that the word 'position' means the employment and not the particular job the employee was performing. David v. Boston & M. R.R., D. C., 71 F. Supp. 342, 345; Morgan v. Wheland Co., D.C., 66 F. Supp. 439, 440; Desbrow v. Smart & Final Co., Ltd., S.D. Cal., 1946, 76 F. Supp. 500; Salzman v. London Coat of Boston, Inc., 1 Cir., 156 F. 2d 538. In the latter case, one Wimick was regularly employed by the defendant and upon his induction into the military service Salzman was employed to take his place under a written contract which contained no provision regarding termination. Later, he left for military service. When Wimick returned he was restored to the position and later Salzman returned and claimed that he was entitled to be restored. The court held that while the position was permanent the employment of Salzman to fill such position was temporary and that he was not entitled to the benefits of the Act."

The significant point in all of the cases, including this one, is that a probationary employee has no seniority rights which mean anything until he has passed his probationary period, inasmuch as he may be discharged at any time with or without cause during the period of his probation. The

primary function of seniority in any collective bargaining agreement is to provide job security and job status, and of course job status is precisely the subject matter of the veterans reemployment statutes. Here, Moe had no job security and no job status until he completed his probationary period, and therefore he is in exactly the same situation as the returning veterans involved in the cases cited above.

Moe contends that his status as a probationary employee is no different than the status of any employee who is not covered by a union contract providing for job seniority. A short answer to that argument is that the courts have uniformly rejected it. Moreover, there is an obvious difference between a probationary employee and an employee who is given no notice whatever that he may be subjected to a review of his qualifications after a set trial period. Moe was specifically placed on notice by Section 21 and by Section 22 (f) of the applicable contract that he was on trial, that his status was different from that of all non-probationary pilots and that Eastern would review his qualifications within the one year probationary period and then determine whether or not he would be given permanent employment. If there were no such contractual notice and if there were no similar understanding between the employer and the employee, any employee who was placed on the payroll would have a right to assume that his qualifications already had been accepted and that he therefore had permanent status.

It should be reemphasized that the judicial precedents on this point are unanimous:

Johnson v. *Interstate Transit Lines*, 71 F. Supp. 882 (D. Utah 1946), *affirmed on other grounds*, 163 F. 2d 125 (10th Cir. 1947); *Doyle* v. *Division No. 1127*, 168 F. 2d 876 (5th Cir. 1948), *affirming*, 76 F. Supp. 655, 658 (W. D. La. 1947), where the decision was the same in both the District Court and the Court of Appeals; *Meredith* v. *Industrial Rayon Corp.*, 117 F. Supp. 815 (N. D. Ohio 1949); *Lesher* v. *Mal-*

lory & Co., supra, where the decision was the same in both the District Court and the Court of Appeals; and *Venzel* v. *United States Steel Co., supra*, where the decision was the same in both the District Court and the Court of Appeals, and where this Court denied certiorari. Thus, it seems fair to say that at least nine courts have considered the matter and all have concluded that a probationary employee such as Moe is a "temporary employee" and therefore is not entitled to reemployment rights under the applicable statutes.

Moreover, these precedents have been known to Congress for many years—beginning in 1946, two years before the 1948 amendment of the Act and five years before the revision and redesignation as the Universal Military Training and Service Act of 1951—and although the veterans reemployment statutes have been amended from time to time, to clarify and expand the rights of veterans, there has been no amendment which would impair the decisions with respect to probationary employees or confer reemployment rights on such employees. Therefore, it must be concluded that the unanimous line of judicial authority has been recognized and accepted by Congress and that, for all practical purposes, the interpretation of "temporary position" appearing in the above-cited cases has been adopted by Congress.

The Court of Appeals cites (Appendix A, p. 44) numerous court decisions to support its conclusion that a mere "expectation that the employment would be continuous" is a sufficient basis for holding that the employment is permanent. Significantly, *none* of the cases cited involved a probationary employee. Undoubtedly, most temporary employees hope, and even expect, to prove their worth and to work their way into permanent positions. But that expectation does not alter the temporary character of their employment.

The Court of Appeals recognizes (Appendix, p. 45) that the *Venzel* and *Lesher* cases are "in point" and in-

distinguishable (except as to the length of the probationary period involved). Clearly the principle announced in those cases—engrafted in the Act itself by failure of Congress to indicate a contrary view throughout the many years that such principle has been consistently followed by numerous courts—should apply to this case.

CONCLUSION

For the reasons and upon the grounds hereinabove set forth, Petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit to review the judgment rendered in this case.

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September 3, 1957

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16409

DERLYN E. MOE,

Appellant,

versus

EASTERN AIR LINES, INC.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(June 18, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

RIVES, Circuit Judge: This action is by an honorably discharged veteran to enforce alleged reemployment rights under Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U.S.C.A. App. §459.[1]

[1] In pertinent part as follows:

"*Separation from service*—(a) *Certificate recording proficiency and merit; physical examination*

"Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. • • •

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes

The appellant insists that the defendant's motion for summary judgment was improperly granted, and that summary judgment should have been rendered in favor of the plaintiff. The appellee, while seeking an affirmance of the summary judgment dismissing the complaint, nevertheless calls to our attention its challenge to jurisdiction which was not ruled on by the district court. The substance of that challenge will be stated and ruled upon as soon as a few of the facts necessary to an understanding of the issues can be set forth.

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application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

• • • • •

"(B) if such position was in the employ of a private employer, such person shall—

"(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status and pay; • • •, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so • • •.

"(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

"(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

"(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c)(1), the district court of the United States for the district in which

Moe was employed by Eastern Air Lines as a copilot on August 4, 1950. Seven months later, on March 1, 1951, he was called to active duty in the Armed Forces of the United States. He remained in the service for about a year and nine months, and on December 1, 1952 was reinstated in Eastern's employ as a copilot, after being honorably discharged from the military service. It is agreed that in all respects save one Moe was treated "as * * * if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."[2] The one respect in controversy is that Eastern refused to credit his time in the service as time on the job with respect to "seniority for pay purposes," and thereby Moe received a lower wage rate than he would have received if he had remained continuously in Eastern's employ. For an understanding of this controversy a con-

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such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided*, That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further*, That only the employer shall be deemed a necessary party respondent to any such action."

50 U.S.C.A. App. §459.

[2] 50 U.S.C.A. App. §459(c)(2).

sideration of the collective bargaining agreement is essential, and we shall recur to that later.

The district court concluded that, under the collective bargaining agreement, Moe held a "temporary position" and, hence, that he had no reemployment rights under the Act. As an additional reason for denying relief, the district court held that, under the Act, time in the service need not be counted as time on the job for the purpose of the system of wage increases awarded under the collective bargaining agreement.

Thus, three questions are presented to this Court for decision: 1, Did the district court have jurisdiction? 2, Did Moe leave a mere "temporary position" to perform his military service? 3, Must Moe's time in the service be counted as time on the job for the purpose of "pay seniority?"

I. Jurisdiction.

Under the collective bargaining agreement, Moe is entitled to have any "grievance concerning any action of the Company" handled in accordance with procedure therein established, including appeals within the Company and then "further appeal" to the Eastern Air Lines Pilots' System Board of Adjustment created in accordance with the requirements of 45 U.S.C.A. §184 and §153. Unless otherwise provided by the Universal Military Training and Service Act, it would appear that the Adjustment Board procedure is the exclusive primary remedy for Moe's grievance.[3] However, Section 9(d) of the Universal Military Training and Service Act, 50 U.S.C.A. App. §459(d) provides:

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[3] Slocum v. Delaware L. & W. R. Co. 339 U.S. 239; Order of Railway Conductors v. Southern Railway Co., 339 U.S. 256; Sigfred v. Pan American World Airways, 5th Cir., 230 F. 2d 13, 18, 19; Alabaugh v. Baltimore & Ohio R. Co., 4th Cir., 222 F. 2d 861; cf. United States ex rel Deavers v. Missouri, K. & T. R. Co., 5th Cir., 171 F. 2d 961, 963.

> "In case *any* private employer fails or refuses to comply with the provisions of subsection (b) or (c) (1) [of this section], the district court of the United States for the district in which such employer maintains a place of business shall have power * * * specifically to require such employer to comply with such provisions and to compensate [the veteran] for any loss of wages or benefits suffered by reason of such employer's unlawful action * * *." (Emphasis supplied.)

Subject to the possibility that the Supreme Court may rule otherwise in deciding No. 849, October Term, 1956, *McKinney* v. *Missouri, K. & T. R. Co.*, certiorari to 10th Circuit, 240 F. 2d 8, granted May 6, 1957, 25 United States Law Week 3327, we think that it is now settled that the foregoing specific jurisdictional grant of the Universal Military Training and Service Act prevails over the more general policy of the Railway Labor Act.[4]

II. "Temporary Position."

The collective bargaining agreement provided that, "The copilot shall be on probation for an aggregate of the first twelve months of his service on flying status as a copilot with the Company." Moe had served only seven months at the time of his induction. The district court concluded:

> "The Court holds that the Plaintiff, Derlyn E. Moe, is not entitled to invoke 50 U.S.C.A. App. §459, because that section specifically *excludes* from its application persons who left a 'temporary position' before entering

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[4] Oakley v. Louisville & N.R. Co., 338 U.S. 278; Diehl v. Lehigh Valley R.R. Co., 348 U.S. 960; Diehl v. Lehigh Valley R.R. Co., 3rd Cir., 211 F. 2d 95, reversed, supra; Bostian v. Seaboard Air Line R. Co., 4th Cir., 211 F. 2d 867; Gregory v. Louisville & N. R. Co., 6th Cir., 191 F. 2d 856; Morris v. Chesapeake & Ohio Ry. Co., 7th Cir., 171 F. 2d 573; Spearmon v. Thompson, 8th Cir., 167 F. 2d 626; Conner v. Pennsylvania R. Co., D.C. Cir., 177 F. 2d 854; cf. United States ex rel Deavers v. Missouri K. & T. R. Co., 5th Cir., 171 F. 2d 961, 963.

> the Armed Forces. When the Plaintiff entered the service on March 1, 1951, he held such a 'temporary position' inasmuch as he was still 'on probation' which meant he had no vested right of employment and could be discharged at any time and for any reason (Union Contract, Section 29(c)(2)).
>
> "The cases of *Venzel* v. *United States Steel Co.*, 209 F. 2d 185 (6th Cir., 1953), and *Lesher* v. *Mallory & Co.*, 166 F. 2d 983 (7th Cir., 1948), held that 'probationary employees' hold 'temporary positions' within the meaning of 50 U.S.C.A. App. §459 (and its predecessor section), and, therefore, those probationary employees may not invoke that section."

It was stipulated that Moe "was never informed orally or by letter or memorandum that he was being employed for a temporary position." The agreement itself makes only two distinctions between a probationary and a non-probationary copilot. It provides that first pilots and copilots who have completed their probationary period "shall, in addition to retaining their position on the seniority list, accrue seniority for pay purposes." The validity of that distinction is attacked in this case and will be discussed in the concluding part of this opinion. The other difference is that a copilot, during his probationary period, is not extended the right of investigation and hearing, meaning, we think, that he is not entitled to use the grievance procedure. In effect, the employment relationship during the probationary period is an employment at will, or so long as is mutually agreeable to both of the parties. Does that make the employment "temporary?"

Section 9(b) of the Act, 50 U.S.C.A. App. §459(b), provides unemployment rights for any person who, in order to perform his military service, leaves a position "other than a temporary position." The Sixth Circuit has well pointed out that the Act does not define the positions covered as "permanent," but simply as "other than temporary." *Bryan* v. *Griffin*, 6th Cir., 166 F. 2d 748, 750. The exclusion is in line with the general purpose of the Act, that a person

called into the service "was not to be penalized on his return by reason of his absence from his civilian job." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284.[5] A temporary job, or one which a person holds only temporarily, might well be lost to him regardless of his call to the colors.

A job itself may be temporary,[6] or the employee's incumbency may be temporary.[7] The job or position of co-pilot exists permanently. The district court thought, however, that during his twelve month probationary period, Moe's incumbency in that position was temporary. We do not agree.

Employers have argued on the one hand that only employees with contracts of definite duration are within the Act's protection; and, on the other hand, that only employees at will are covered by the Act.[8] Neither fact, in our opinion, is controlling. Keeping in mind the purpose of the Act, we think that the controlling determination is whether, regardless of the contract of employment, there was a reasonable expectation that the employment would be continuous and for an indefinite time.[9] Applying that

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[5] In the same opinion, it is noted that, "This legislation is to be liberally construed for the benefit of those who left private life to serve their Country in its hour of great need." 328 U.S. at p. 285. Compare Trailmobile Co. v. Whirls, 331 U.S. 40.

[6] Houghton v. Texas State Life Insurance Co., 5th Cir., 166 F. 2d 848; Spearmon v. Thompson, 8th Cir., 167 F. 2d 626, 630.

[7] Howie v. Lance, 4th Cir., 172 F. 2d 107; Salzman v. London Coat of Boston, Inc., 1st Cir., 156 F. 2d 538; Venzel v. United States Steel Corp., 6th Cir., 209 F. 2d 185; Lesher v. Mallory & Co., 7th Cir., 166 F. 2d 983.

[8] Compare United States ex rel Stanley v. Wimbish, 4th Cir., 154 F. 2d 773, with Trusteed Funds v. Dacey, 1st Cir., 160 F. 2d 413.

[9] See the full discussion in Trusteed Funds v. Dacey, 1st Cir., 160 F. 2d 413, 415. See, also, Bryan v. Griffin, 6th Cir., 166 F. 2d 748, 750; Houghton v Texas State Life Insurance Co., 5th Cir., 166 F. 2d 848; United States ex rel Stanley v. Wimbish, 4th Cir., 154 F. 2d 773.

test, it is clear that Moe held "other than a temporary position." As a probationary employee he had every reason to expect that his employment would be continuous and for the indefinite future, as indeed it turned out to be.

The Venzel Case, *supra*, from the Sixth Circuit and the Lesher Case, *supra*, from the Seventh Circuit, relied upon by the district court, are admittedly in point, though it might be noted that in those cases the probationary period was three months instead of twelve months, as here. With deference, however, each of those cases seems to us to put undue emphasis on the formal or nominal designation of the employee as "probationary" and to ignore the justifiable expectation of continuous employment for the indefinite future and the policy behind the exception of those in a temporary position. For the reasons stated, we are unable to follow those decisions.

III. "Pay Seniority."

The collective bargaining agreement provided that a copilot's "seniority for pay purposes is to be computed on the actual length of service as a pilot with the Company, except as provided in this agreement." The single exception to the requirement of "actual length of service" is the provision heretofore noted that first pilots and copilots who have completed their probationary period "shall, in addition to retaining their position on the seniority list, accrue seniority for pay purposes" during periods of active military service.

The contract provided for a monthly base or minimum pay which varied with the length of service with the Company. The first year a copilot received $350.00 per month, the second year $400.00 per month. The third year the base rate dropped to $250.00 per month and increased each year until, at the eighth year, the base rate reached $350.00 per month. However, from the third to the eighth year, copilots were paid, in addition to their base pay, an hourly wage rate. This additional hourly wage rate depended on the

type of craft, the gross weight of the craft, the number of miles flown during the month, whether the flights required day or night flying, and the length of service of the copilot. Finally, a minimum monthly guarantee was provided, which for the first two years was the base pay and thereafter increased yearly until the eighth year when it was $565.00 a month. Thus, a copilot was insured of a yearly wage increase for the first eight years of his service. The pay of first pilots was computed in a similar manner covering an eight year period, so that a qualified employee, beginning as a copilot, could expect his earnings to increase gradually and substantially over a sixteen year period, if, after eight years, he was promoted to the first pilot.

The district court proceeded upon the theory that the "actual length of service" of a probationary copilot is to be used as a measure of his proficiency. It is true, that a benefit which accrues by virtue of the increased skill and ability that comes from experience on the job is not covered by the Act. Military service is not a substitute for proficiency. *Altgens* v. *The Associated Press*, 5th Cir., 188 F. 2d 227; *Poore* v. *Louisville & Nashville R. Co.*, 5th Cir., 235 F. 2d 687. On the other hand, there is an element of experience in every seniority system.

Under the contract itself, it seems to us that the increased wage rate was not intended to be related peculiarly to proficiency. Thus, as to first pilots and copilots who have completed their probationary period, seniority for pay purposes continues to accrue during periods of active military service even if they have no flying experience in the Armed Forces. Flying experience with another company is not counted in computing the wage rate as would be the case if the wage increases were awarded for the increased proficiency that comes from experience. Wage increases based on length of service are completely automatic, with no discretion in anyone to withhold the increase if it is not merited. Proficiency would obviously be a much more important factor in a system of seniority governing assign-

ments to flights requiring skill and ability than in a system of seniority for pay purposes.

The Third Circuit in its opinion in *Diehl* v. *Lehigh Valley R. Co.*, 211 F. 2d 95, 99, found an irreconcilable conflict between the "continuous employment" test and the "furlough or leave of absence" test, and adopted the latter. The Supreme Court granted certiorari and summarily reversed the judgment in a per curiam opinion, 348 U.S. 960, which in turn relied upon the opinion in *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278, based solely on the "continuous employment" test. The "continuous employment" test was provided in Section 9(c)(2), enacted in 1948:

> "It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored *in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.*" (Emphasis supplied.)

According to the legislative history, the addition was "a statement of policy regarding the application of the 'escalator principle.'" Senate Report 1268, 80th Congress, 2nd Session, 16. The so-called "escalator principle" was first enunciated in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284, 285: "* * * he * * * does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." The "continuous employment" test was again repeatedly referred to in *Oakley* v. *Louisville & N. R. Co.*, 338 U.S. 278, 282, 283, 284, 285. It received the final and definite approval of the Supreme Court in *Diehl* v. *Lehigh Valley R. Co.*, 348 U.S. 960.

It would seem obvious that, in the case of a conflict between the terms of the Universal Military Training and

Service Act and the terms of a private contract, the Act must control. In *Fishgold* v. *Sullivan Drydock & Repair Corp., supra* at p. 285, the Court said: " • • • no • • • agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." Again, *Diehl* v. *Lehigh Valley R. Co.*, 348 U.S. 960, held that a contract provision requiring a period of actual work on the job before the accrual of seniority was invalid as to a veteran. Moe was entitled to the status he would have enjoyed had he been continuously in his civilian employment. The judgment is therefore reversed and the cause remanded with instructions to enter judgment for the plaintiff.

REVERSED.

A true copy

Test:

s/ EDWARD W. WADSWORTH
Edward W. Wadsworth

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

APPENDIX "B"

(Caption Omitted)

On August 22, 1956 Summary Judgment was filed in the words and figures as follows:

This cause having come on to be heard on the 15th day of June, 1956, upon the Plaintiff's Motion for Summary Judgment filed on April 23, 1956, and upon the Motion of Defendant Eastern Air Lines To Dismiss and For Summary Judgment filed on February 27, 1956, and the Court having examined the said Motions and the affidavits attached thereto and having heard argument of counsel, and having granted counsel leave to file memoranda of law, which memoranda have been filed and considered by the Court, and subsequent to the said hearing on July 10, 1956, counsel for both parties having entered into a Stipulation of certain facts which was filed on July 10, 1956, and upon the filing of said Stipulation with the Court on the 9th day of July, 1956, counsel for the Plaintiff announced to the Court that it desired leave of Court to withdraw its Motion For Leave To Serve Supplemental Affidavits, Take Depositions, And To Propound Requests For Admissions, filed on June 29, 1956, which leave was orally granted at that time and which leave the Court hereby grants *nunc pro tunc*, and the Court having further considered the said Stipulation together with the above matters, is of the opinion that Summary Judgment in favor of the Defendant Eastern Air Lines should be entered and that Plaintiff's Motion For Summary Judgment and Defendant's Motion To Dismiss should be denied.

The record discloses that Plaintiff, Derlyn E. Moe, was employed by the Defendant, Eastern Air Lines, as a co-pilot (on a probationary basis) on August 4, 1950, and remained in the employ of the Defendant until he was called to active duty in the Armed Forces of the United States

on March 1, 1951. When the Plaintiff was separated from the service he was reinstated in the employ of the Defendant as a copilot. Upon this reinstatement on December 1, 1952, the defendant did not grant the Plaintiff any "seniority for pay purposes" for the time that he served in the Armed Forces. The Plaintiff claims that under 50 U. S. C. A. App. §459 he was entitled to receive "seniority for pay purposes" for the time so served in the Armed Forces even though under the Union Contracts, in effect at all times material to this case, between the Defendant and the Plaintiff's union it was specifically provided (Section 22 (f))

> ". . . Pilots [on active military service] who have completed their probationary period in accordance with Section 20 [sic, should be 21] of this Agreement shall in addition to retaining their position on the seniority list accrue seniority for pay purposes."

The Court holds that the Plaintiff Derlyn E. Moe, is not entitled to invoke 50 U. S. C. A. App. §459, because that section specifically *excludes* from its application persons who left a "temporary position" before entering the Armed Forces. When the Plaintiff entered the service on March 1, 1951, he held such a "temporary position" inasmuch as he was still "*on probation*" which meant he had no vested right of employment and could be discharged at any time and for any reason (Union Contract, Section 29 (c) (2)).

The cases of *Venzel* v. *United States Steel Co.*, 209 F. 2d 185 (6th Cir. 1953), and *Leshen* v. *Mallory & Co.*, 166 F. 2d 983 (7th Cir. 1948), held that "probationary employees" hold "temporary positions" within the meaning of 50 U. S. C. A. App. §459 (and its predecessor section), and, therefore, those probationary employees may not invoke that section.

Section 22 (f) of the Union Contracts, *supra*, clearly demonstrates the intent of the Defendant and the Plaintiff's union to place pilots on probation, who enter the service, in the category of temporary employees under 50 U. S. C. A. App. §459.

An additional reason exists to deny recovery to the Plaintiff. In the case of *Altgens* v. *The Associated Press*, 188 F. 2d 227 (5th Cir. 1951), The Fifth Circuit Court of Appeals held that the "step-rate system of compensation," under which pay increases result from increased experience on the job, was not "seniority" within the meaning of 50 U. S. C. A. App. §308 (d), which section was identical to and was the predecessor of 50 U. S. C. A. App. §459 (c). The Court stated at page 729:

> "The step-rate system places a monetary value on experience . . . [*We*] are convinced that progress in this step-rate system was intended to be based solely upon wirephoto experience. Time spent in the service of our armed forces, however praiseworthy it may be, is not necessary wirephoto experience in any sense of the word, and we can find no language in the statute which authorizes us to call it such."

That "seniority" and "seniority for pay purposes" are entirely different terms is further evidenced by certain provisions of the said Union Contracts. Section 22 (f), *supra*, makes the distinction very clearly. In addition, Section 11 provided:

> ". . . Their [copilots] seniority for pay purposes is to be computed on the actual length of service as a pilot with the Company, except as provided in this Agreement."

And Section 18, entitled "Seniority General," defined specifically what is meant by the term "seniority." Nowhere is pay mentioned but great detail is set forth to specify many other matters affected by "seniority." Subsection (b) stated:

> "(b) Seniority shall begin to accrue from the date a pilot is first placed on the payroll on *regular pilot* status at which time he will be given a concurrent seniority number and from which date seniority shall continue to accrue during his period of service." (Emphasis supplied.)

The Court holds that the term "seniority for pay purposes" as employed in the said Union Contracts means the same as the "step-rate system of compensation" ruled upon in the *Altgens* case, *supra*.

The Court has also considered the case of *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (1946), wherein the Supreme Court held at page 284:

> "Thus he [the veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the point he would have occupied had he kept his position continuously during the war."

The opinion of the Supreme Court deals clearly with "seniority" in the *non-experience sense*. Nowhere in that opinion does the Court infer that under a step-rate system of compensation, based on experience, will a veteran be entitled to have accrued experience which he never actually received. The seniority escalator about which the Supreme Court refers is the pure, automatic, seniority, as clearly defined in the *Altgens* case and as defined in Sections 18 *et seq.* of the said Union Contracts in the case at bar.

The Court also points out the recently decided case of *Poore* v. *Louisville and Nashville R. R.*, Fifth Circuit Court of Appeals, No. 16033 (July 20, 1956), which decides a similar question. The opinion rendered herein is in complete accord with the reasoning and language of that decision.

The Court is of the opinion that for the reasons stated the Defendant's Motion for Summary Judgment should be granted, it is

ORDERED AND ADJUDGED that Defendant's Motion For Summary Judgment be and the same is hereby granted, and it is,

FURTHER ORDERED AND ADJUDGED that Summary Judgment be and the same is hereby entered in favor of the Defen-

dant, Eastern Air Lines, Inc., and against the Plaintiff, Derlyn E. Moe, and it is,

FURTHER ORDERED AND ADJUDGED that Defendant's Motion To Dismiss be and the same is hereby denied, and it is,

FURTHER ORDERED AND ADJUDGED that Plaintiff's Motion For Summary Judgment be and the same is hereby denied.

DONE AND ORDERED in chambers at Miami, Florida, this 22nd day of August, 1956.

/s/ EMETT C. CHOATE,
United States District Judge

APPENDIX "C"

JUDGMENT

Extract from the Minutes of June 18, 1957

DERLYN E. MOE,

No. 16409. versus

EASTERN AIR LINES, INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with instructions to enter judgment for the plaintiff, Derlyn E. Moe;

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No. 419

In the Supreme Court of the United States

OCTOBER TERM, 1957

EASTERN AIR LINES, INC., PETITIONER

v.

DERLYN E. MOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
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MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida (R. 53–58) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 38–48) is reported at 246 F. 2d 215.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1957 (Pet. App. 38). A petition for a writ of certiorari was filed on September 3, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether respondent held "a temporary position", as that phrase is used in the veterans' reemployment provisions of the Universal Military Training and Service Act, 50 U. S. C. 459, solely because he was a probationary employee.

2. Whether that Act entitles an honorably discharged veteran to count his time in the service as time on the job for the purpose of pay seniority.

3. Whether a veteran seeking to vindicate rights under that Act must exhaust his remedies before an Adjustment Board, established pursuant to the Railway Labor Act, prior to seeking judicial relief under the Training and Service Act.

STATUTE INVOLVED

Section 9 of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 50 U. S. C. App. 459, provides in relevant part as follows:

> (a) Any person inducted into the armed forces under this title for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within

ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; * * * unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would

have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c) (1), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions, and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided,* That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against any person who may apply for such

benefits: *Provided further,* That only the employer shall be deemed a necessary party respondent to any such action.

* * * * *

STATEMENT

This action was instituted against Eastern Air Lines, Inc. by Derlyn E. Moe,[1] an honorably discharged veteran in the Air Lines' employ, to enforce re-employment rights under Section 9 of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 50 U. S. C. App. 459, *supra,* pp. 2–5. On cross-motions for summary judgment, the District Court denied the veteran's claim on two grounds: (1) as a probationary employee, Moe held a "temporary position" within the meaning of the Act and was therefore excluded from its coverage, and (2) the right to accrue seniority for pay purposes during military service was not conferred by the Act (R. 53–58). Because relief was denied, the District Court found it unnecessary to rule on Eastern's contention (R. 5) that Moe's suit was barred because of his failure to pursue his administrative remedy before the Eastern Air Lines Pilots' System Board of Adjustment.

The Court of Appeals for the Fifth Circuit reversed (Pet. App. 38–48). It held (1) that the specific jurisdictional grant of the Universal Military Training and Service Act did not require Moe first to seek relief before the Adjustment Board, (2) that as a probational employee Moe had a reasonable ex-

[1] The Department of Justice appears for respondent pursuant to 50 U. S. C. App. 459 (d), *supra,* p. 4. Under the same provision, petitioner was represented in both courts below by the Department of Justice.

pectation that his employment would be continuous and for the indefinite future, and therefore he held "other than a temporary position," and (3) that Moe was entitled to count his military service as time on the job for purposes of pay seniority.

The undisputed facts may be summarized as follows:

Respondent was employed by Eastern Air Lines as a co-pilot on August 4, 1950 (R. 34, 46). Seven months later, on March 1, 1951, he was called to active duty in the armed forces of the United States (R. 34, 46). When he returned, after receiving an honorable discharge (R. 34, 46), Eastern reemployed him, but refused to credit his time in the service as time on the job with respect to "seniority for pay purposes" (R. 34–35, 46). This resulted in Moe's receiving a lower wage rate than he would have received had he been continuously in his civilian employment.

The collective bargaining agreement between the Air Line Pilots Association, International, and Eastern Air Lines, which was in effect at the time Moe returned from the service, provided for a somewhat complicated wage system: Section 11 (a) provided for a monthly base pay for co-pilots which varied with the length of service with the Company (R. 20). The first year a co-pilot received $350 per month; the second year $400 per month (R. 20). The third year the base rate dropped to $250 per month and increased each year until, at the eighth year, the base rate reached $350 per month (R. 20). However, from the third to the eighth year, co-pilots were

paid, in addition to their base pay, an hourly wage rate. This additional hourly wage rate depended on the type of craft, the gross weight of the craft, the speed of the flight, the number of miles flown during the month, whether the flight required day or night flying, and the length of service of the co-pilot (R. 20–22). Finally, a minimum monthly guarantee was provided, which for the first two years was the base pay and thereafter increased yearly until the eighth year, when it was $565 a month (R. 22–23). Thus, a co-pilot was assured of a yearly wage increase for the first eight years of his service. The pay of first pilots was computed in a similar manner (R. 16–19) covering an eight-year period, so that a qualified employee beginning as a co-pilot could expect his earnings to increase gradually and substantially over a sixteen-year period if, after eight years, he were promoted to a first pilot. The contract referred to the length-of-service factor, as used for purposes of pay computation, as "seniority for pay purposes" (Section 11 (b); R. 20).

The contract further provided that, while "[a co-pilot's] seniority for pay purposes is to be computed on the actual length of service as a pilot with the Company" (R. 20), all non-probationary pilots and co-pilots[2] shall continue to accrue seniority for pay purposes during military service (R. 25). Under these provisions of the agreement, respondent was not entitled to accrue seniority for pay purposes because he

[2] Section 2 (a) of the agreement defines "pilot" to include co-pilot (R. 13).

had served only seven of a twelve-month probationary period when he was inducted. Section 21 of the Agreement provided that "[a] co-pilot shall be on probation for an aggregate of the first twelve months of his service on flying status as a copilot with the Company" (R. 24). On his return from military service, respondent completed his probationary period and became a regular co-pilot (R. 34, 46). He has been serving satisfactorily in this capacity ever since (R. 34, 46).

On January 18, 1956, Moe instituted this action pursuant to Section 9 of the Universal Military Training and Service Act to have his seniority for pay purposes computed as if he had been continuously in the employ of the Company and to recover the loss of salary resulting from Eastern's failure to do so (R. 2–4).

ARGUMENT

1. The veterans' reemployment provisions of Section 9 of the Universal Military Training and Service Act 62 Stat. 604, as amended, 50 U. S. C. App. 429, exclude from coverage those veterans who left "a temporary position", 50 U. S. C. App. 459 (b). Prior to the decision in the instant case, the Sixth and Seventh Circuits had held that probationary employees held temporary positions within the meaning of the Act and were therefore excluded from its coverage. *Venzel* v. *United States Steel Co.*, 209 F. 2d 185 (C. A. 6), certiorari denied, 348 U. S. 838; *Lesher* v. *P. R. Mallory & Co.*, 166 F. 2d 983 (C. A. 7). The decision in

the case at bar admittedly conflicts with these two decisions which we regard as erroneous.

The context in which *Venzel* and *Lesher* were argued and decided makes plain the reason for the error of those cases. In the early litigation construing the phrase "a temporary position", the question arose as to whether this exclusionary language was to be interpreted as applicable only to the position itself, or whether it also excluded from coverage an employee whose incumbency in a position was temporary even though the position itself was permanent. On the one hand, it was argued that the court's sole inquiry must be whether the position itself is temporary. On the other hand, it was said that a veteran who had held a position temporarily was excluded from the Act's coverage, even though the position he had occupied was itself permanent. See *e. g., Spearmon* v. *Thompson,* 167 F. 2d 626 (C. A. 8), certiorari denied, *sub nom. Delozier* v. *Thompson,* 335 U. S. 822, 886; *Doyle* v. *Division No. 1127,* 76 F. Supp. 655 (W. D. La.), affirmed on other grounds, 168 F. 2d 876 (C. A. 5). It was in this context that the question of whether a probationary employee held a "temporary position" was presented to the Sixth and Seventh Circuits in *Venzel* and *Lesher.* The veterans argued that, since the positions themselves were permanent, the occupants were necessarily covered. The courts refused to accept this contention and held that a temporary occupant of a permanent position is also excluded from cover-

age.[3] We do not contend here, nor did we contend below, that this reasoning of these earlier cases was erroneous. The Sixth and Seventh Circuits fell into error, however, because, having decided the main issue of whether a temporary occupant of a permanent position is outside the Act's coverage, they then automatically held a probationary employee to be temporary without considering the particular nature of his status.

The test for distinguishing between temporary and non-temporary occupants of a position has become

---

[3] The court said in the *Venzel* case:

> We agree with the view expressed by the District Judge * * * that in determining whether or not the appellant left a position other than a temporary position when he was inducted into service, we must consider the status of the particular employee in the position which he then occupied rather than the permanency of the job which may at times be filled by either a permanent or a temporary employee * * *. [209 F. 2d at 186].

In the *Lesher* case, the court stated the question as follows:

> As to the meaning to be attributed to "a position other than a temporary position," plaintiffs contend, as we understand, that the controlling words of this phrase are "a position," and that if the position is permanent it is immaterial as to the relation which the employee sustains thereto. In other words, if a position is permanent, the employment is not temporary, regardless of its character. On the other hand, it is the defendant's contention that the controlling factor is the employment relationship, even though the position itself may be permanent.
>
> Plaintiffs are not only confronted with the findings made by the court below but cite no authority which supports their contentions. In fact, the weight of authority, although not too decisive, points in the opposite direction. [166 F. 2d at 985].

well-established. The question is whether the employee has a reasonable expectation that his employment will be continuous and for the indefinite future. The leading case is *Trusteed Funds* v. *Dacey*, 160 F. 2d 413, 419 (C. A. 1):

> * * * It must have been contemplated that their employment with the company would be continuous, for the indefinite future, and that their respective contracts would be renegotiated and renewed from time to time as a matter of course * * *. The positions were expected to be continuous ones, provided the relationship proved to be mutually satisfactory. This is none the less true because of the fact that the company (Sec. 8 apart)[4] could terminate the employment by refusing to renew the contract upon its expiration. The same may be said of an ordinary workman employed at will. It may be apparent from the circumstances attending the creation of the employment that the position was expected to be continuous, for the indefinite future, and notwithstanding the right of the employer to terminate the employment at any time such position is one "other than a temporary position" within the meaning of Section 8. In either case, the effect of Section 8, enacted by Congress under its broad war powers, is to impose upon the employer an obligation he had not contracted to assume—an obligation to reemploy the veteran, and not to discharge him without cause within one year after such restoration. In either case the veteran may need the statutory protection. The

[4] Now Section 9, 50 U. S. C. App. 459.

> two cases present no difference in principle. * * *.[5]

If the Sixth and Seventh Circuits had directly considered whether a probationary employee was in fact a temporary occupant of the position, it is probable that those courts, too, would have concluded that, where a probationary employee has a reasonable expectation of continuous employment for the indefinite future, he is not "temporary" within the meaning of the Act.

In respondent's case, it is clear that he had a reasonable expectation that his employment would be continuous and for the indefinite future, as indeed it turned out to be. The only distinction which the Agreement makes between a probationary and a non-probationary co-pilot (other than the right to accrue seniority for pay purposes during military service, a provision which was declared invalid by the court below) is that a probationary co-pilot is not extended the right of investigation and hearing, *i. e.,* is not entitled to use the grievance procedure (Section 29 (c) (2); R. 27). In effect, the employment relationship during the probationary period is an employment at will, or so long as it is mutually agreeable to both parties, but it is clear that an employment at will is not a "temporary" one. *Trusteed Funds* v. *Dacey,*

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[5] The following cases have also applied this "reasonable expectation of continuous employment" test: *Salzman* v. *London Coat of Boston, Inc.*, 156 F. 2d 538 (C. A. 1), certiorari denied, 329 U. S. 806, *Bryan* v. *Griffin*, 166 F. 2d 748 (C. A. 6); *Houghton* v. *Texas State Life Insurance Co.*, 166 F. 2d 848 (C. A. 5); *United States ex rel. Stanley* v. *Wimbish*, 154 F. 2d 773 (C. A. 4).

supra; Bryan v. *Griffin, supra; Daniels* v. *Barfield,* 71 F. Supp. 884 (E. D. Pa.).

2. Petitioner next argues that the right to accrue seniority for pay purposes during military service is not covered by the Act. Its argument rests on two legs: first, that the collective bargaining agreement provides that a probationary co-pilot will not accrue seniority for pay purposes during his military service; and, second, that the wage increases based on pay seniority are in effect given for the increased proficiency that comes with experience and are therefore not covered by the Act.

(*a*) Petitioner's first argument contravenes the principle, well established since *Fishgold* v. *Sullivan Drydock & Repair Corporation,* 328 U. S. 275, that "* * * no * * * agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act" (328 U. S. at 285), and also ignores the dispositive holding in *Diehl* v. *Lehigh Valley R. Co.,* 348 U. S. 960, declaring invalid (as to a veteran) a collective bargaining provision which required, as does the instant contract, actual time on the job before the accrual of seniority.[6]

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[6] *Diehl* rested on the "continuous employment" test, which received statutory endorsement in Section 9 (c) (2) of the Act, 50 U. S. C. App. 459 (c) (2):

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

Petitioner's attempt to limit *Diehl* to its own facts (Pet. 27–29) is similar to the arguments presented by the respondent in *McKinney* v. *Missouri-Kansas-Texas Railroad Co.*, pending on a writ of certiorari to the Court of Appeals for the Tenth Circuit, No. 93, this Term. The major distinction petitioner offers is that *Diehl* dealt with seniority *other* than for pay purposes. But it is significant that neither the opinion of the Court of Appeals in that case, (211 F. 2d 95 (C. A. 3)) nor the *per curiam* opinion in this Court reveals the particular nature of the right or rights that were to accrue to the employee by virtue of his seniority; this clearly indicates that, regardless of what particular right accrues by virtue of seniority, the holding was that a veteran's service-time is to be counted as time-on-the-job so long as the right accrues merely from the passage of time. Section 9 (c) (2) of the Act, 50 U. S. C. App. 459 (c) (2) footnote 6, *supra*, p. 13. There is no sound reason for distinguishing among the many rights which accrue under an employee's seniority.

(*b*) But the petitioner also argues that because seniority for pay purposes accrues, under Eastern's collective bargaining agreement, only with actual time-on-the-job (with the significant exception of non-probationary pilots and co-pilots on military leave), these increases are awarded not merely by virtue of the passage of time, but rather because of the increased proficiency and skill coming from actual experience. The Court of Appeals recognized below that, under the Act, military service is not a substitute for proficiency (Pet. App. 46). But it also

recognized that there is an element of experience, and therefore proficiency, in every system of seniority, and that the accrual of seniority in the instant case was not peculiarly related to experience[7] (Pet. App. 46). That this is so is shown by the provision that all non-probationary pilots and co-pilots continue to accrue seniority for pay purposes *during their military service* regardless of whether or not their military duties are at all related to their work on the airline. Moreover, flying experience with another company is not credited to a new employee, as would be the case if the wage increases were awarded for the increased proficiency coming from experience. Also, the seniority wage increases are entirely and completely automatic without discretion in any one to grant or withhold them. In short, a realistic examination of these step-rate increases shows that they are awarded to assure the employer of a relatively stable and satisfied labor force by insuring the satisfactory employee of normal economic progress. In these circumstances, the Act does not permit the veteran's normal up-grading to be retarded by artificially characterizing these increases as awarded for increased proficiency.

---

[7] The Court of Appeals noted that on occasion the passage of time may be used as a measure of proficiency, and in such a case, military service does not count as time on the job. For example, military service has been held not to count toward the fulfillment of an apprenticeship requirement, since the apprenticeship period is required to insure that certain skills will be acquired before the apprentice is made a full-fledged member of the craft; entrance to the craft is not based on mere passage of time. *Poore* v. *Louisville and Nashville Railroad Co.*, 235 F. 2d 687 (C. A. 5).

3. The petitioner's remaining argument—that the employee cannot take his case to court until he has first presented his claim to an Adjustment Board established under the Railway Labor Act, 45 U. S. C. 184—may be dealt with shortly. Section 9 (d) of the Universal Military Training and Service Act specifically confers jurisdiction on the district courts "[i]n case any private employer" fails to comply with the re-employment provisions of the Act. There is no indication that Congress intended to distinguish between veterans seeking re-employment rights against carriers governed by the Railway Labor Act and veterans seeking re-employment rights in other industries. In *McKinney* v. *Missouri-Kansas-Texas Railroad Co.*, 240 F. 2d 8, 10–11, pending on writ of certiorari, No. 93, this Term, the Tenth Circuit declared:

> * * * The mandate of the statute is clear and it does not condition the right to institute and maintain such an action upon prior exhaustion of the administrative procedure under the Railway Labor Act. Inasmuch as this type of labor dispute is peculiar to veterans and the statute specifically applies to veterans as a class, prior exhaustion of administrative procedures under the Railway Labor Act is unnecessary. * * *

In addition to the explicit rejection of petitioner's argument by the Fifth Circuit below and by the Tenth Circuit, the same contention has been impliedly rejected by this Court and by at least six other courts of appeals which have entertained suits against carriers without requiring the veteran to exhaust his administrative remedies under the Railway Labor Act. *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 378; *Diehl* v.

Lehigh Valley R. Co., 348 U. S. 960; *Diehl* v. *Lehigh Valley R. Co.*, 211 F. 2d 95 (C. A. 3), reversed, *supra*; *Bostian* v. *Seaboard Air Line R. Co.*, 211 F. 2d 867 (C. A. 4); *Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856 (C. A. 6), certiorari denied, 343 U. S. 903; *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967; *Spearmon* v. *Thompson*, 167 F. 2d 626 (C. A. 8), certiorari denied, *sub nom. Delozier* v. *Thompson*, 335 U. S. 822, 886; *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C. A. D. C.).

CONCLUSION

As indicated above, we believe the decision below to be clearly correct. However, we recognize that in view of the apparent conflict of circuits on the first issue discussed above (*supra*, pp. 8–13), and the similarity of the second and third issues (*supra*, pp. 13–17) to those presented by the *McKinney* case, No. 93, the Court may wish to grant the writ or to withhold action on this petition until the disposition of *McKinney*.

Respectfully submitted.

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OCTOBER 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957

IN THE

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OCTOBER TERM 1957

No. 419

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

DERLYN E. MOE,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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DERLYN E. MOE.

Respondent.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

This Court is respectfully urged to reconsider its order of June 30, 1958, denying certiorari in this case, for the following reasons:

(1) The denial of certiorari leaves in effect a sharp conflict (the existence of which is recognized by Moe, himself), between the decision of the Court of Appeals in this case and the decisions of two other circuit courts of appeals as to whether a probationary employee holds a "temporary position" within the meaning of the Universal Military Training and Service Act (62 Stat. 614, 65 Stat. 75; 50 U. S. C. 459); and

(2) The denial of certiorari leaves in effect a decision which, in practical effect, grants Moe a *promotion* (from probationary to permanent status) to which he was not automatically entitled under the applicable collective bargaining agreement—contrary to the holding of this Court in *McKinney v. Missouri-Kansas-Texas R.R.*, No. 93, decided June 23, 1958.

Background of This Case

Moe was a probationary copilot when he left Eastern's employ on March 1, 1951 to enter military service. Upon return to Eastern on December 1, 1952, Moe admits (R. 34) that he was given "the same status and seniority *except for purposes of pay* that plaintiff would have enjoyed had he continued in the employment of defendant continuously from the time of plaintiff's entering the armed forces until the time of his reinstatement to his employment . . ." (italics added).

Moe alleged that he should have been given credit *for pay purposes* for the period of his military service—that is, that he should be treated as if he had been *promoted out of* his probationary status while on military furlough and should be paid accordingly.

The applicable collective bargaining agreement provides (R. 24, 27) that a copilot "shall be on probation for an aggregate of the first twelve months of his service on flying status as a co-pilot with the Company" and that during the probationary period he may be discharged at any time without cause and without a right of hearing or appeal. This necessarily means that, during the one-year probationary period, Moe's continued employment, and his possibility of promotion to permanent status, were entirely dependent on managerial discretion.

The trial court held that Moe's probationary status was "temporary", and that in any event he was not entitled to an advance in pay based on his military service. The court of appeals reversed on both grounds.

The petition for certiorari in this case was filed September 3, 1957. The Department of Justice filed a memorandum in response to the petition, recognizing (pp. 8-9) a square conflict between the decision of the Court of Appeals in this

case and decisions in the Sixth and Seventh Circuits as to the temporary status of a probationary employee, arguing that the Court of Appeals in this case was right, and concluding (p. 17):

> "As indicated above, we believe the decision below to be clearly correct. However, we recognize that in view of the apparent conflict of circuits on the first issue discussed above (*supra*, pp. 8-13), and the similarity of the second and third issues (*supra*, pp. 13-17) to those presented by the *McKinney* case, No. 93, the Court may wish to grant the writ or to withhold action on this petition until the disposition of *McKinney*."

That statement of the Department of Justice appeared to be a clear recognition (1) that a conflict between Circuits existed which should be clarified by this Court; and (2) that the principles established in the McKinney decision probably would control the disposition of this case. Thus, when this Court affirmed the lower court (and the position of the employer) in the *McKinney* case—holding that promotional rights dependent on managerial discretion do not accrue during military service—it seemed logical to assume that the instant case would be governed by that decision, that certiorari would be granted, and that the decision of the Court of Appeals to the contrary would be reversed.

Denial of certiorari in this case, only a week after the decision in the *McKinney* case, creates a most confusing situation which, unless corrected by this Court, will inevitably lead to needless controversy and litigation.

ARGUMENT

I.

Certiorari should be granted to resolve the admitted conflict among Circuits as to the reemployment rights of a probationary employee.

This Court's rules clearly provide for the granting of writs of certiorari to resolve conflicts among the various courts of appeals. Here, the existence of a conflict is spelled out in the Memorandum filed by the Department of Justice on Moe's behalf in response to the petition for certiorari (pp. 8-9 of the Memorandum):

> "Prior to the decision in the instant case, the Sixth and Seventh Circuits had held that probationary employees held temporary positions within the meaning of the Act and were therefore excluded from its coverage. *Venzel* v. *United States Steel Co.*, 209 F. 2d 185 (C. A. 6), certiorari denied, 348 U. S. 838; *Lesher* v. *P. R. Mallory & Co.*, 166 F. 2d 983 (C. A. 7). The decision in the case at bar admittedly conflicts with these two decisions which we regard as erroneous."

The merits of this issue are thoroughly discussed at pages 31-37 of the petition for certiorari.

II.

Certiorari should be granted to conform the decision in this case to this Court's decision in the *McKinney* case.

As noted above, the Department of Justice, representing Moe, evidently thought that the decision of this Court in the *McKinney* case would control the instant case.

The principles announced by this Court in the *McKinney* decision would seem to require reversal of the Court of Appeals decision in this case. The principles thus announced which seem controlling are the following:

1. ". . . the statute does not itself create a seniority system, but accepts that set forth in the collective bargaining agreement . . ."

2. "However, Section 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from *experience, effort, or chance* to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would *necessarily* have occurred *simply by virtue of continued employment* will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained *as of right*, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

"Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher

than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but *on the exercise of discretion on the part of the employer.* On his return from service, petitioner in the present case could not have demanded under the statute that respondent place him in any group 1 position. Promotion to a group 1 position from group 2, in which petitioner had formerly been employed, is not dependent simply on seniority. Under Rule 1 (3) (A) of the collective bargaining agreement it is *dependent on fitness and ability and the exercise of a discriminating managerial choice. Collective bargaining agreements that include such familiar provisions are presupposed by the statute, and it is in their context that it must be placed.* See *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 527. Petitioner was not entitled to a group 1 position simply because in his absence it had been bulletined, and if he had then been employed he might have applied for it, and respondent might have found that he possessed the requisite fitness and ability. *The statute does not envisage overriding an employer's discretionary choice by any such mandatory promotion.* Nor does it sanction *interfering with and disrupting the usual, carefully adjusted relations among the employees themselves regarding opportunities for advancement.*" (Italics added.)

3. "Since respondent was not obligated to give petitioner the higher position at all, when it did so it was not bound to give him a seniority date earlier than that to which any employee similarly promoted would have been entitled."

As noted above, and as clearly shown in the record (R. 24, 27), the collective bargaining agreement governing Moe's employment rights gives management *unrestricted discretion* (not even subject to hearing or appeal) as to

whether a probationary copilot ever is promoted to permanent status (and the higher rate of pay which goes with such promotion). During that probationary period, Moe could have been discharged without cause and without resort to the grievance procedure or any other remedy. Thus, his possibility of promotion to the next higher copilot position (second-year, *permanent* status) was fully as much dependent "on the exercise of discretion on the part of the employer" as was that of McKinney. Just as in the case of McKinney, his promotional possibilities were dependent on "experience, effort, or chance", they would not have ripened into actual promotion "necessarily . . . simply by virtue of continued employment" or "as of right, within the system of his employment . . ." On the contrary, as in the case of McKinney, his promotion was "dependent on fitness and ability and the exercise of a discriminating managerial choice."

Since the collective bargaining agreement plainly gave management full discretion as to promotion from probationary to permanent status, the lower court's decision conflicts with the Act by "overriding an employer's discretionary choice by . . . mandatory promotion", and it further interferes with and disrupts "the usual, carefully adjusted relations among the employees themselves regarding opportunities for advancement." In effect, the lower court decision tells Eastern Air Lines and the Air Line Pilots Association that they *may not* condition promotion on actual experience and proven ability, coupled with management satisfaction with such experience and ability. Yet this Court's decision in the *McKinney* case clearly says that there is nothing in the Act which prohibits such a condition.

The Justice Department's understanding that Moe would lose if McKinney lost is clearly reflected in its citation (p. 19 of its brief in the *McKinney* case) of the lower court

Moe decision for the proposition "that a veteran who under the terms and conditions of his employment would probably have obtained a higher position in his employment, but for the intervention of military service, must, upon return and upon being promoted to the higher position, be given a seniority date in that position that he would have had had he been continuously employed." Since this Court has rejected the "probability" test for promotion in the *McKinney* case, parity of reasoning requires rejection of the same test in the case of Moe.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court's order denying certiorari should be reconsidered, certiorari should be granted, and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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July 14, 1958.

CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the petition is restricted to grounds specified in this Court's Rule 58 (2).

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Of Counsel